STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 8, 2023]

ANDRE MARIZAN	:	
	:	
v.	:	**C.A. No. PM-2019-8573**
	:	
STATE OF RHODE ISLAND	:	

DECISION

NUGENT, J. Before this Court is Petitioner Andre Marizan's (Petitioner or Mr. Marizan) Application for Post-Conviction Relief (Application). Petitioner was indicted by a grand jury on February 14, 2014. *See State v. Marizan*, 185 A.3d 510, 513 (R.I. 2018). The indictment charged him with two counts of first-degree sexual assault in violation of G.L. 1956 §§ 11-37-2(1) and 11-37-3. *See* Indictment. A jury of his peers found him guilty of Count One on January 23, 2015,[1] *see* Trial Record (Tr.) 650:11, and this Court sentenced him to a prison term of forty years with twenty-five years to serve, the balance of fifteen years suspended. *See* April 23, 2015 Sentencing (Sentencing) 24:19-24. The Rhode Island

[1] Count One of the Indictment charged that Andre Marizan engaged in penile/vaginal penetration with Olivia Escobar, knowing her to be mentally incapacitated in violation of § 11-37-2(1) and § 11-37-3 on or about August 18, 2012. *See* Indictment. Count Two charged that Marizan engaged in the same conduct on the same date, knowing Olivia Escobar to be physically helpless in violation of the same statutes. *Id.* The parties agreed that the Court should instruct the jury on only one count, which could be proven by establishing either physical helplessness or mental incapacitation as alternate theories. (Tr. at 556:7-560:25.) *See State v. Matthews*, 88 A.3d 375, 379-82 (R.I. 2014) (explaining that when a defendant is charged with violating the same criminal statute under multiple theories in Rhode Island, he may be charged in one count and the jury may be instructed on the separate theories). The State dismissed Count Two, (Tr. 560:6-7,) and the Jury was instructed on both theories under Count I. *Id.* at 637:24-638:5.

Supreme Court affirmed his conviction on direct appeal, *see generally Marizan*, 185 A.3d 524, after which this Court granted a motion to reduce Petitioner's sentence. *See* Amended Judgment of Conviction and Commitment (reducing the sentence to 37 years, with 22 to serve and 15 suspended). Petitioner initiated the instant collateral attack on his conviction in August of 2019. *See generally* Application. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1. For the reasons set forth below, the Application is **DENIED**.

I

Facts and Travel

A

Preliminary Proceedings and Trial

The crime that was the subject of Petitioner's trial took place on August 18, 2012. *See* Indictment. A warrant issued for his arrest on January 9, 2013. (Tr. at 460:12-13.) Police arrested Mr. Marizan on August 16, 2013. *Id.* at 460:15. Upon being confronted by Police appearing at his residence to execute the arrest warrant, Petitioner jumped off the fire escape that connected to the third-floor apartment and attempted to flee apprehension, fighting the officers before being taken into custody. *Id.* at 463:16-464:16 (describing the substance of a witness' testimony that was excluded from trial on the Defense's request). On April 8, 2014, then-Defendant Mr. Marizan entered a not guilty plea at arraignment on the above-described charges of first-degree sexual assault. *See* Docket.

At trial, the State argued in its opening that Mr. Marizan raped Olivia Escobar (Ms. Escobar) after she passed out at a party. (Tr. at 159:21-164:11.) The State called Ms. Escobar as its first witness. (*Id.* at 168:4-5.) Ms. Escobar testified that she was living with

her sister Brittany Pinales[2] (Ms. Pinales) at her mother's house at the time of the crime, around August 17, 2012. *Id.* at 170:12-17. The witness testified that on August 17, 2012, she went to the beach in South County with Brittany. *Id.* at 171:20-172:3. Ms. Escobar testified that she and her sister were drinking Hennessey brand cognac while at the beach. *Id.* at 172:6-15. After the beach closed, Ms. Escobar described that the two left the beach to go to Brittany's ex-boyfriend Rafael Lopez's (Mr. Lopez) house. *Id.* at 172:21-24. The house was occupied by Mr. Lopez, who went by Rafa, and his two brothers, cousin, and mother, whom Ms. Escobar described to have all been at the house that day. *Id.* at 174:2-11.

Ms. Escobar explained that Mr. Lopez enjoyed possessory ownership of a unit on the top floor of the house that comprised a living room, two bedrooms, and a bathroom. *Id.* at 174:13-175-14. Ms. Escobar related that Mr. Lopez, his brother Alejandro, Mr. Marizan, and a gentleman named Victor Sanchez (Mr. Sanchez) were in attendance. *Id.* at 175:13-18. Describing the unit, Ms. Escobar testified that Mr. Lopez occupied a bedroom that faced the living room. *Id.* at 182:19-20.

After identifying the Defendant, *id.* at 176:7, Ms. Escobar explained that Andre Marizan grew up with her sister Brittany and that she (Ms. Escobar) had known him as an acquaintance and family friend since he was a teenager (approximately ten years). *Id.* at 176:9-177:3. Ms. Escobar testified that she and Pinales arrived around 5 or 6 PM at the residence, took showers, and socialized with the others, drinking and listening to music until around 8 PM. *Id.* at 178:7-24.

[2] The record does not disclose if the name is spelled "Piñales" or "Pinales." The Court accordingly spells the name "Pinales."

Thereafter, Ms. Escobar attested to accompanying Mr. Lopez, Ms. Pinales, and Mr. Marizan to Eblens, a clothing store in Olneyville. *Id.* at 179:1-13. Ms. Escobar testified that Mr. Marizan lent her money to buy a pair of shoes, describing that Mr. Marizan also purchased a pair of shoes, while Ms. Pinales bought a dress. *Id.* at 179:19-23. Thereafter, Ms. Escobar explained that the group went to a liquor store. *Id.* at 179:20-23. Ms. Escobar purchased a bottle of champagne and some Moscato wine. *Id.* at 180:2. The group proceeded to Mr. Lopez's house. *Id.* at 181:2-3. Ms. Escobar explained that the group did not leave the premises again that night, although they did get more alcohol delivered to the house. *Id.* at 181:5-16. Ms. Escobar testified that she also smoked two or three blunts with Mr. Lopez. *Id.* at 183:20-24.

Ms. Escobar elaborated that the group was socializing in the living room when the party decided to relocate to Mr. Lopez's bedroom, where there was A/C. *Id.* at 184:3-10. After purchasing alcohol from a bootlegger who visited the property, *id.* at 185:3-24, Escobar testified that she passed out. *Id.* at 186:21.

Ms. Escobar testified that she had been in a two-year relationship with someone in August of 2012, but that they had broken up the day before she went to Mr. Lopez's house. *Id.* at 189:5-24. She described that after the crime, the two got back together. *Id.* at 190:11-13.

Returning to the night of the crime, Ms. Escobar explained that "myself personally I know that I probably consumed from seven to eight bottles of champagne, cognac, and wine." *Id.* at 191:12-14; *see also id.* at 191:19 ("I didn't feel good. I was throwing up."). She also described that there was no food in her stomach. *Id.* at 191:25-192:1. Before passing out on the bed, which was the last thing from the night that she remembered, *id.* at

192:11-13, Ms. Escobar recalled that the group was in the bedroom, and she was talking to Alejandro. *Id.* at 192:16-19. Thereafter, she put a baseball cap over her eyes and fell asleep. *Id.* at 192:20-23. She was wearing green cargo pants, a burgundy T-shirt, a hat, and boat shoes. *Id.* at 193:2-6. She did not remember removing any of her clothes before falling asleep. *Id.* at 193:8-9.

In the morning around 7 AM, *id.* at 193:22-23, Ms. Escobar testified that she woke up and touched her face to find that it was covered in something gritty. *Id.* at 193:15-16.[3] She then noticed that her shoes were still on, but she was not wearing pants or panties and there was something wet on her leg. *Id.* at 193:18-19. Her shirt was pulled up, and one of her breasts was exposed. *Id.* at 194:13-15. Escobar said that she looked around the room and saw Mr. Marizan "on the other corner of the bed, and I started flipping out." *Id.* at 195:4-5. Mr. Marizan was awake. *Id.* at 196:2. Nobody else was in the bed, and the door was open. *Id.* at 195:14.

Ms. Escobar got up, and asked "what did you do to me?" *Id.* at 195:21. Ms. Escobar testified that Mr. Marizan said she was "bugging. Nothing happened." *Id.* at 195:22. She asked where her pants were, and what was on her leg, and testified that he responded that it was urine, and that she had taken her clothes off because she urinated on herself. *Id.* at 195:23-24. She described going into the next room, where Mr. Lopez, Ms. Pinales, and Mr. Sanchez were sitting. *Id.* at 196:16-19.[4] Ms. Escobar related that her sister said "fuck him up. He disrespected you." *Id.* at 195:19-20. Ms. Escobar testified that she went into the

[3] Escobar later learned that the substance on her face was baking soda, *id.* at 205:2, which her sister and Rafa had sprinkled on her as a prank when she fell asleep. *Id.* at 205:1-25; *see also id.* at 207:9 (playing a recorded video of the prank for the jury).

[4] The witness initially described beating Marizan up before going back to describe details that she recounted taking place before confronting him. *Id.* at 195:24-25.

bathroom to wash off her leg. *Id.* at 198:12-14. Then, she stated that she attacked Mr. Marizan,[5] jumping on top of him and hitting him, while he yelled "leave me alone," "nothing happened," and "you're bugging." *Id.* at 198:21-25. Mr. Sanchez pulled her off Mr. Marizan while she was choking him. *Id.* at 199:5-6. Her sister then found Ms. Escobar's clothes, *id.* at 196:15-16, balled up in the empty room under someone else's clothes. *Id.* at 197:15-21. Although Mr. Marizan had said that Ms. Escobar had urinated on herself, she said that the clothes were dry. *Id.* at 197:24-25. Ms. Escobar put the clothes back on. *Id.* at 198:7-8.

Next, Ms. Escobar and her sister left, *id.* at 199:17-19, and Ms. Pinales drove Ms. Escobar directly to the hospital. *Id.* at 199:23-24, 200:5-9. Ms. Escobar went to the emergency room, *id.* at 200:18-19, and explained to the staff that she wanted to be examined, that she believed there was semen on her leg, and that she wanted to press charges. *Id.* at 200:21-201:1. Ms. Escobar received antiviral and contraceptive drugs and underwent an examination. *Id.* at 201:11-13, 17-18. The staff also called the police, *id.* at 201:24, and two officers arrived. *Id.* at 202:4-5. Ms. Escobar told them something happened to her on Ruggles Ave. (the scene of the crime), and the police left. *Id.* at 202:11-13.

On Tuesday August 21, Ms. Escobar went to the police station to give a formal statement. *Id.* at 209:23-25. The witness concluded her testimony on direct examination by emphasizing that she did not have consensual sex with Andre Marizan, stressing that she did not agree to have sex with him. *Id.* at 220:8-12.

On cross-examination, the witness clarified her testimony generally. *See id.* at 221-

[5] The witness testified to having been a professional boxer at one point. *Id.* at 171:15.

304. The witness admitted to having certain prior convictions, *id.* at 227-228, and stated that she got back together with her boyfriend a few days after the crime. *Id.* at 237:22-25.

Olivia Escobar's sister Brittany Pinales testified next. *Id.* at 305-400. She generally corroborated Ms. Escobar's account of what transpired on August 17, 2012, stating that the two were drinking on the beach, *id.* at 307:18-21, before going to her (Ms. Pinales') ex-boyfriend Mr. Lopez's house at 107 Ruggles St. in Providence. *Id.* at 309:16-310:2. She similarly described going out, *id.* at 314:5-25, 318:10-15, returning to hang out at the apartment, *id.* at 321:1-323:5, and moving to the bedroom for the air conditioner. *Id.* at 323:11-15. She testified that Mr. Marizan and Ms. Escobar fell asleep on the bed around 3:00 AM. *Id.* at 324:1-14. Ms. Pinales also fell asleep for ten or fifteen minutes. *Id.* at 324:3-4, 20-24. She woke up again, but Ms. Escobar and Mr. Marizan remained asleep. *Id.* at 324-325:3.

Then, Ms. Pinales pranked Mr. Marizan and Ms. Escobar by sprinkling baking soda on their faces as a joke, while Mr. Lopez recorded. *Id.* at 325:23-326:24. The baking powder did not cause Ms. Escobar to wake up, *id.* at 326:16-18, but it did cause Mr. Marizan to wake up immediately. *Id.* at 330:23-25. Mr. Marizan was angry, *id.* at 331:10-12, and he went to the bathroom to clean his face. *Id.* at 331:23. Ms. Pinales returned to the living room, *id.* at 332:8-9, and Mr. Marizan went back to the bathroom, *id.* at 332:15-16, before returning to the bedroom. *Id.* at 332:15-16. Mr. Lopez attempted to enter the bedroom ten or fifteen minutes later, but the door was locked. *Id.* at 332:16-18; *see also id.* at 333:7-10. Ms. Pinales tried to open the door as well, but it would not open, *id.* at 334:20, so Mr. Lopez went to get the bedroom key. *Id.* at 334:20-23. He opened the door, and Ms. Pinales testified that she entered the bedroom where Mr. Marizan and Ms. Escobar were,

id. at 335:3-4, and saw Ms. Escobar with no pants on. *Id.* at 335:16-17. Ms. Pinales elaborated that her sister was not awake. *Id.* at 336:12, 21.

Ms. Pinales testified that Mr. Marizan got up from the bed and left the bedroom to go into the hallway, and Ms. Pinales asked him what he was doing, *id.* at 337:6-8, to which he responded, "what are you talking about?" *Id.* at 339:5. Mr. Marizan was only wearing boxers. *Id.* at 337:9-12. Ms. Pinales tried to wake her sister, but she did not wake up. *Id.* at 338:11-12. Mr. Marizan returned to the bedroom, and Ms. Pinales entered also to see if she could wake her sister but was unsuccessful. *Id.* at 339:7-8; *see id.* at 342:15-19. Then Ms. Pinales, Mr. Lopez, and Mr. Sanchez decided to go get something to eat. *Id.* at 339:8-11. Mr. Marizan went back to sleep next to Ms. Escobar. *Id.* at 340:17-18. Mr. Marizan still had only boxers on, *id.* at 340:22-23, and Ms. Escobar was not wearing pants or underwear. *Id.* at 340:24-341:2.

Ms. Pinales, Mr. Lopez, and Mr. Sanchez were at the Newport Creamery, *id.* at 341:22, for about 30 minutes to an hour. *Id.* at 342:3-9. Upon their return to Ruggles Ave., Ms. Pinales testified that she found Ms. Escobar still sleeping next to Mr. Marizan (who was also sleeping) and woke her up. *Id.* at 343:2-11. At some point, Ms. Pinales found Ms. Escobar's clothes in the unused room. *Id.* at 349:14-24. Ms. Pinales testified that she was in the living room and told Ms. Escobar to "go kick his ass." *Id.* at 344:1-6. Ms. Pinales described that her sister then proceeded to attack Mr. Marizan, scratching him and beating him up. *Id.* at 344:11-21.

Ms. Pinales explained that Mr. Marizan did not say much aside from yelling and saying that Ms. Escobar had peed in a cup. *Id.* at 345:1-8. Ms. Pinales recalled that Mr. Lopez broke up the fight, *id.* at 345:9-13, Mr. Marizan left the house, *id.* at 345:16, and

Ms. Pinales drove to the hospital with her sister. *Id.* at 345:16-17.

On cross-examination, *see id.* at 350-398, the witness answered questions about how much she had been drinking, *see, e.g.*, *id.* at 351, 353-356, her knowledge or lack of knowledge of what happened in the room while the door was locked, *id.* at 365-366, why she went to go eat, leaving her sister in the room with the now-Defendant, *id.* at 373-374, why she didn't call the police, *id.* at 372, 376, and the circumstances surrounding the visit to the hospital, *id.* at 389-390, among other things. *See generally id.* at 350-398.

After Ms. Pinales' redirect examination, *see generally id.* at 398-401, Officer Joseph Villella took the stand. *See generally id.* at 401-421. He testified to responding to the scene, taking photographs, and collecting bedding to be tested. *See id.* at 405:22-406:9; *see also id.* at 406:3-4 (explaining that he got a fitted sheet, pillowcases, a comforter, and sheet from the apartment). He described the method of collecting evidence in a sexual assault case. *Id.* at 406:21-408:17.

Then Registered Nurse and Sexual Assault Nurse Examiner Amy Corrado testified. *Id.* at 422-451. The witness recounted her training in processing sexual assault evidence collection kits. *Id.* at 423-426. The witness thereafter described the process of conducting a sexual assault exam. *Id.* at 427-429. Ms. Corrado proceeded to discuss performing an exam and employing an evidence collection kit (with DNA swabs) in Ms. Escobar's case. *Id.* at 430-448.

The State's penultimate witness, Detective William Corrigan, *see generally id.* at 451-478, testified that he took statements from Ms. Escobar and Ms. Pinales, *id.* at 454:24-455:2, and collected a DNA buccal swab from Mr. Marizan when he was arrested. *Id.* at 455:6-20; *see also id.* at 458:14-16 (explaining that the purpose of the swab is to get a

reference DNA sample to see if it would match anything from Escobar's exam). Detective Corrigan explained that he did not speak with Mr. Sanchez or Mr. Lopez because Ms. Escobar told him that they would not cooperate with the investigation. *Id.* at 459:2-10. On cross-examination the witness conceded that he is supposed to collect as much information as he can about a case, *id.* 465:11-13, elaborated that Ms. Escobar's statement described her partner as a boyfriend not an ex-boyfriend, *id.* at 467:5-11, and clarified that Ms. Escobar refused to provide him with contact information for Alejandro Lopez, Rafa Lopez, and Victor Sanchez. *Id.* at 463:7-24.

Outside the jury's presence, the Court considered and granted a motion to exclude testimony from Officer Chris Poncia, who would have testified that Marizan attempted to flee apprehension when he was arrested on the charges in this case, along with six other outstanding warrants. *Id.* at 463:14-477.

Lastly, the State called Cara Lupino, supervisor of the Rhode Island Department of Health Forensic DNA Laboratory, to testify about tests her office conducted on the DNA samples the lab received from the hospital and from police. *See generally id.* at 478-554.[6] Ms. Lupino testified that the lab generated a report on September 17, 2012, which confirmed that a vaginal DNA[7] swab from Ms. Escobar's hospital exam tested positive for seminal fluid. *Id.* at 484:10-485:16. The test did not yield sperm cells, however. *Id.* at

[6] The parties stipulated that the witness could testify as an expert and could introduce certain test results even though she had not personally conducted the tests. *Id.* at 468:14-469:9. In entering this agreement, the Defense agreed to waive valid confrontation clause objections to the testimony's admissibility. *See id.*; *see also Bullcoming v. New Mexico*, 564 U.S. 647, 651 (2011) (characterizing the holding in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009)).

[7] The witness testified that she washed the stain off her leg before going to the hospital. (Tr. at 198:12-14; *see also id.* at 194:25-195:2 (Ms. Escobar testifying that "there was semen or there was a fluid on my leg").)

485:19-20. The lab also tested a stain on one of the bedsheets and determined that it was a bloodstain containing male DNA. *Id.* at 487:1-488:13. The lab requested, *id.* at 486:7-11, received, *id.* at 489:6-8, and conducted tests on, *id.* at 489:20-21, a reference sample from then-suspect Andre Marizan. *Id.* at 489:18-21.

The lab's tests revealed that the vaginal swab was consistent with Ms. Escobar's DNA reference sample. *Id.* at 491:11-15. The bloodstain was consistent with Mr. Marizan. *Id.* at 492:19-20. However, the lab was unable to confirm whether the seminal fluid was consistent with Mr. Marizan's reference sample. *Id.* at 491:23-492:7. The witness proceeded to explain, however, that the lab "started working on a new detection kit called YSTRs, which is specific for the Y chromosome that is only found in males." *Id.* at 493:4-6. The witness described that the YSTR testing technique had been in use for "at least ten years" and had been in use in other labs throughout the country, but that Rhode Island "had not started using it yet." *Id.* at 493:7-15. After initiating the testing program for YSTR, *id.* at 493:24-494:25 (explaining, among other things, that the lab underwent an internal validation process to ensure the testing procedure's integrity), the lab was looking for cases that might be suitable for YSTR testing, *id.* at 495:1-25, and chose to retest evidence in cases like this case where there was seminal fluid on a sample but no sperm because "this new technology would be able to detect the low male DNA that's in [the samples]." *Id.* at 496:1-4. The lab resubmitted some of the evidence in this case. *Id.* at 496:8-11. Defense counsel objected to the witness' proffered expert opinion on whether the sample was consistent with Mr. Marizan, *id.* at 496:19-499:9. The Court sustained the objection, ruling that the State had not demonstrated the reliability of the lab's internal validation process nor the experience of the persons conducting the tests. *Id.* at 500:12-501:5.

The witness then testified in much greater depth to the lab's training on, and internal validation of, YSTR tests. *Id.* at 501:16-508:11. The State continued asking questions to clarify and define Y-STR testing, allowing the witness to describe what the term means and how the testing works. *Id.* at 513:14-514:19. The State then asked the witness "[t]o a reasonable degree of scientific certainty, do you have an expert opinion as to whether the YSTR DNA profile from -- excuse me -- whether the YSTR profile was a match or was consistent with the swab, the vaginal swab." *Id.* at 518:6-10. The witness responded that "[t]o a reasonable degree of scientific certainty, the YSTR DNA profile from the vaginal swab is consistent with the YSTR profile from Andre Marizan. YSTRS are also inherited through the paternal line, so --" *id.* at 518:16-19, at which point defense counsel interposed an objection. *Id.* at 518:20-21. The Court allowed the witness to continue, *id.* at 518:22-25, and Ms. Lupino proceeded to explain that "YSTRs are passed down from father to son to grandson, so males in the same paternal line will have the same YSTR profile." *Id.* at 518:23-25. The prosecutor followed up by saying "[s]o there is a caveat that you were adding, really for the suspect's benefit, that there is a potential that if there was another male related to this suspect that that could also be consistent with?" *Id.* at 519:1-4. This question also prompted an objection, *id.* at 519:5, which was sustained. *Id.* at 519:6.

Defense counsel vigorously cross-examined Ms. Lupino. *Id.* at 519:14-554:16. Mr. Marizan's lawyer asked detailed questions probing the amount of time that expired between the initial test and the later retest. *Id.* at 523:6-8. He convinced the witness to effectively admit that the lab could have sent out the samples for Y-STR testing before developing its own YSTR testing program, as the lab had sometimes done before its own program went live around October 2013. *Id.* at 523:5-25. He asked questions to clarify

differences between traditional Short Tandem Repeat testing, the Y-STR approach, and prior modes of DNA testing. *Id.* at 524:5-528:7. Counsel asked questions about the storage of evidence, *id.* at 523:5-11, and testing reagents. *Id.* at 532:1-9, 536:23-24. He inquired about the training that the lab undertook to prepare for this type of testing. *Id.* at 539-540. Counsel established that this was one of the first, if not the first, cases in which Y-STR DNA results from the Rhode Island lab were being used at trial. *Id.* at 548:4-14.

Ms. Lupino conceded that although she believed the sample from the vaginal swab came from Mr. Marizan, *id.* at 551:10-20, she did not know how the sample got there, stating that it could have been the result of a consensual encounter. *Id.* at 552:3-6. On recross, *id.* at 553:20-554:16, Defense counsel elicited an admission that the testing is not infallible. *Id.* at 553:22-554:13.

After the presentation of evidence but before closing arguments, Defense counsel successfully moved, over the State's objection, for an instruction informing the jury that the State would have to prove beyond a reasonable doubt that the victim did not consent, even though the Defense had not presented any evidence that the encounter was consensual. *Id.* at 573:19-22. In his closing, counsel for the defense primarily argued that Ms. Escobar had consented to sexual contact, saying that the result from the DNA swab "could have been the result of a sexual assault, but it equally could have been something as common as an ordinary, everyday encounter between men and women engaged in consensual sexual intercourse." *Id.* at 579:19-23. Counsel emphasized the amount of substance use that took place at the event, *see id.* at 581:19-23, 582:23-24, explained that the locked door could be explained by Mr. Marizan's desire to have seclusion without getting pranked again, *id.* at 585:17-23, and contended that since no one heard sounds in

the living room or thought twice about leaving the two in the apartment together to go eat, the other witnesses must not have believed that a crime had taken place. *Id.* at 586:10-25; *see also id.* at 590:1-4 (arguing that the jury should draw inferences from the fact that the bystanders did not try to remove Mr. Marizan from the scene). The Defense additionally posited that the complaining witness' ability to remember details up until the moment she lost consciousness indicated that she was not truthfully unable to remember what transpired thereafter. *Id.* at 591:2-20.

Moreover, Defense counsel argued that Ms. Escobar fabricated the crime in an effort to return to good terms with her ex-boyfriend, with whom she had broken up a few days prior to the assault. *Id.* at 591:22-592:10; *see also id.* at 592:14-25 (arguing that the victim in the case consented to sex but later regretted it, calling the case one of "buyer's remorse."); *see also id.* at 594:12-595:10. Defense counsel further questioned Ms. Pinales' credibility in light of her supposed motive to support her sister's account of what happened, *id.* at 595:11-18, and pilloried Detective Corrigan for failing to talk with all of the witnesses who were present in the house. *Id.* at 595:19-597:3. Lastly, Defense counsel spoke to the Y-STR test, assailing the technology as new, unproven, and biased by the involvement of vendors who have a financial stake in the validation of the equipment that they sell. *Id.* at 597:4-599:3.

The prosecution began its closing saying "Let's clear up one thing. There's not a shred of evidence in this case, not a shred before you, to suggest that this was consensual sex. Not from Olivia Escobar. Certainly not from Brittany. And not from him." *Id.* at 600:3-7. The allusion prompted a motion to pass the case from the Defense. *Id.* at 600:8-20. Upon resuming its closing argument, the State argued that "[m]aybe he thought he could get away

with it. But he didn't. Science caught him. DNA doesn't lie." *Id.* at 604:24-25. The State highlighted the video, arguing that "you can see with your own eyes and your ears what Olivia looked like that night, how she was when she passed out." *Id.* at 605:9-11.

Emphasizing that "[c]onsent should be freely given. It should be loudly proclaimed[,]" *id.* at 605:19-20, the prosecutor reminded the jury that "[y]ou heard her say she drank a lot that night," *id.* at 605:24-25, describing that "she smoked some blunts and she passed out hard." *Id.* at 606:2. The State reminded the jury that upon waking up "the next morning . . . She's completely naked from the waist down. She can't find her clothes anywhere. . . . And she looks over, and she sees this defendant cowering in the corner." *Id.* at 606:4-15. After showing the Jury the video again, asked, "is that someone who had consensual sex?" *Id.* at 607:8-9.

After describing other key evidence in the case, *id.* at 607-613, the prosecutor returned to the issue of DNA evidence, which the State described as important because "[t]he State also has to prove penetration." *Id.* at 613:15-16. The State argued to the jury that "[y]ou know that penetration happened in this case. You know that through the testimony of Amy Corrado, the nurse who is trained in administering sexual assault kits, quote/unquote, 'rape kits.'" *Id.* at 613:18-21. The prosecutor continued to say that it "is the vaginal swab that is so important in this case. It comes from inside Olivia. Inside of her. And that is the vaginal swab that has this defendant's seminal fluid on it. It's a match. Consistent with. That's how penetration is established in this case." *Id.* at 614:9-14.

The prosecutor repeated this point, saying:

> "Finally, you have what is a most important piece of evidence from Cara Lupino, that in her expert opinion -- you heard she was qualified as an expert in DNA analysis by this Court and that she's been on numerous occasions. I

> think she said between 20 and 25 -- that that vaginal swab in her expert opinion had seminal fluid that was a match to this defendant." *Id.* at 615:18-24.

Focusing in on Y-STR DNA, the State submitted that "[t]his isn't junk science," *id.* at 616:23, repeating that "Cara Lupino told you in her expert opinion that the vaginal swab taken from Olivia is from this defendant." *Id.* 617:4-5.

On January 23, 2015, the Jury returned a verdict of Guilty. *Id.* at 650:11. The Court thereafter denied the motion to pass the case, *id.* at 658:9-13, 659:16-18, on which it had earlier reserved judgment. *See id.* at 602:11-15.

B

Motion for New Trial

The Court convened a hearing on February 26, 2015 to address a motion for new trial that Defendant lodged with the Court after the jury returned its verdict. *See generally* New Tr. Mot. Hr'g.

After reciting the applicable legal standards, *id.* at 30:24-31:14, and analyzing the evidence in the case, *id.* at 32:24-51:5, the Court denied the motion to overturn the jury's verdict. *Id.* at 53:5-7 ("there was more than enough evidence, credible evidence in this case, to satisfy the elements of the first-degree sexual assault."). The Court once again denied the motion to pass the case that arose from the statement during closing arguments. *Id.* at 52:25-53:4 ("So certainly, this was fair comment based upon the defendant's comments and the evidence in the case.").

C

Sentencing

The Court conducted a sentencing on Thursday April 23, 2015. *See generally*

Sentencing. The Court heard from the State, *see id.* at 1:22-8:11, whose presentation set forth a statement from Ms. Escobar, *see id.* at 3:3-4:3, and an application of certain facts to enumerated sentencing factors, *see id.* at 4:4, before recommending a sentence of forty years with twenty-five to serve. *Id.* at 7:21-22. Counsel for the defense argued that the factual circumstances of the crime, *id.* at 11:6-8, the Defendant's criminal history, *id.* at 13:20-22, the Defendant's prospects for rehabilitation, *id.* at 14:2-4, and the inherent ability of all persons to redeem themselves, *id.* at 14:18-15:1, all counseled in favor of a more lenient sentence. *Id.* at 6-10.

The Court began by noting the offense's seriousness. *Id.* at 15:19-25. Analyzing the case's facts against guideline sentencing benchmarks, *id.* at 16:1-12, the Court noted that the crime severely impacted the victim's life. *Id.* at 16:13-24. The Court found that a sentencing benchmark that applies when aggravating circumstances warrant a harsher sentence, *id.* at 16:1-5, applied to the facts of this case. *Id.* at 19:11-12. The Court noted the Defendant's criminal record, *see id.* at 20:19-20; *see also id.* at 21:12-13, potential for rehabilitation, *id.* at 22:3-4, disciplinary record while in custody, *id.* at 22:7-10, and the need for deterrence. *Id.* at 22:17-24:13. After taking into account the relevant statutory criteria and injuries the victim sustained as a result of the crime, the Court announced a sentence of forty years with twenty-five to serve and an accompanying probationary term of fifteen years suspended with fifteen years of probation, alongside registration as a sex offender. *Id.* at 24:14-25:2.

D

Appeal to the Rhode Island Supreme Court

Defendant filed a notice of appeal on May 1, 2015. *See* Docket. The Rhode Island

Supreme Court affirmed the conviction *in toto* on June 12, 2018. *See generally State v. Marizan*, 185 A.3d 510 (R.I. 2018).

E

Motion for Reduced Sentence

Mr. Marizan filed a motion to reduce his sentence on September 28, 2018. *See* Docket. In his motion, Mr. Marizan's lawyer highlighted struggles that Marizan encountered in his childhood, *see* Mem. in Supp. of Def.'s Mot. to Reduce Sentence 1-3, detailing his efforts to educate himself and find gainful employment in the face of adversity. *See id.* at 2-3. The motion also stressed Mr. Marizan's commitment to his son and family, *id.* at 3-6, his attempts to overcome substance use, *id.* at 6-7, and his superlative academic achievement while incarcerated. *Id.* at 7-9. The State objected. *See* State's Obj. to Def.'s Mot. to Reduce Sentence.

In response to the motion, the Court entered an Amended Judgment of Conviction and Commitment, reducing the sentence to thirty-seven years with twenty-two to serve and fifteen years suspended with fifteen years of probation. *See* Am. J. of Conviction and Commitment.

F

Application for Post-Conviction Relief

Mr. Marizan filed the application for post-conviction relief here under consideration on August 19, 2019. *See* Appl. for Post-Conviction Relief Pursuant to Rhode Island General Laws, §§ 10-9.1-1 ET. SEQ.

In an accompanying memorandum, Mr. Marizan argues that trial counsel's failure to vigorously challenge the Y-STR evidence admitted against him deprived him of the

effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States. *See* Mem. at 14-16. Mr. Marizan submits that his attorney's failure to educate himself about the technical specifics of how Y-STR testing works and his failure to retain an expert witness to testify on Mr. Marizan's behalf constituted deficient representation so unreasonable as to render his lawyer's performance constitutionally inadequate. *Id.* at 16-17. Moreover, Mr. Marizan argues that the constitutionally deficient representation prejudiced his case because, if his lawyer had done a reasonably adequate job, there is a reasonable probability that the outcome would have been different. *Id.* at 17-19. Consequently, Mr. Marizan reasons that the conviction's integrity is not sound, and concludes that he is entitled to a new trial. *See id.* at 19. In a post-hearing memorandum, Mr. Marizan contends that his lawyer erred by failing to adequately challenge the State's DNA evidence as well as failing to introduce Mr. Marizan's statement, which would have provided affirmative evidence of consent. *See* Pl.'s Post-Hr'g Mem. at 15-28.

The State contends in its post-hearing memorandum that Attorney Levy's failure to more vigorously challenge the Y-STR evidence in the case was effective under the circumstances, and rejoins that even if it were not, there was no prejudice because the evidence of guilt was overwhelming. State's Post-Hr'g Mem. at 6-7. The State posits that Attorney Levy's decision to pursue a consent defense was not ineffective, arguing that it made sense in the context of the case. *See id.* at 8-11. The State also claims that it was a sound strategic move not to introduce Petitioner's statement at trial because doing so would not have been possible lest Petitioner took the stand, which would have exposed him to withering cross-examination. *Id.* at 10-11. The State argues that even if the failure to introduce Petitioner's statement was erroneous, there would be no prejudice because

Petitioner is guilty of committing the offense. *Id.* at 12-13.

G

Evidentiary Hearing

The Court conducted an evidentiary hearing on March 1, 2023. *See generally* Mar. Tr. Petitioner first called Attorney David Levy, who defended him at trial. *See id.* at 4:7-22. Attorney Levy testified that his client gave a voluntary interview with the police in connection with the case in which he admitted to having sex with Ms. Escobar and claimed that the encounter was consensual. *Id.* at 9:4-24. Attorney Levy explained that the statement supported his trial strategy of pursuing a consent defense. *Id.* at 23:8-22. Attorney Levy clarified that there were strategic reasons on both sides that factored into whether to use the statement and whether to advise his client to testify, including whether his client could be impeached. *Id.* at 22:6-25. Attorney Levy distanced himself from an affidavit submitted on his behalf in the case, clarifying that parts of it which implied that his steps in the case were not conscious, strategic choices were not accurate. *Id.* at 25:14-27:11.

Next, Plaintiff called Dr. Carll Ladd, an expert in DNA science who worked at the State of Connecticut Forensic Laboratory for over thirty years. *Id.* at 29:23-30:11. Dr. Ladd testified that if the State of Rhode Island's random match probability data are accurate, so is its conclusion that Mr. Marizan's Y-STR profile could have come from one in 6,667 males in the general population, or 75 people unrelated to the defendant in Rhode Island. *Id.* at 44:18-21, 56:18-22. Dr. Ladd agreed that the vaginal swab used in the case is consistent with Petitioner's reference sample. *Id.* at 54:3-7. Dr. Ladd testified that he believed the DNA evidence was not presented accurately in Court, because there was no

testimony about the strength of the DNA match in the case, which prevented the jury from being able to understand how likely Mr. Marizan was to be the sample's source. *Id.* at 55:17-56:16.

The State called Cara Lupino to testify as an expert in DNA science on the State's behalf. *Id.* at 66-67. Ms. Lupino testified that the probability the Y-STR profile came from Mr. Marizan was one in 6,667 males in the general population. *Id.* at 72:5-73:1.

II

Standard of Review

Postconviction relief is a statutory remedy available to "[a]ny person who has been convicted of, or sentenced for, a crime . . . who claims . . . [t]hat the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state" or who claims "[t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" Section 10-9.1-1(a)(1), (4).

Chapter 9.1, section 1, of title 10 of the Rhode Island General Laws provides:

> "[a]ny person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims [various enumerated defects in a conviction or sentence][8] may institute, without paying a filing fee, a proceeding under this chapter to secure relief." Section 10-

[8] The enumerated criteria are: "(1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state; (2) That the court was without jurisdiction to impose sentence; (3) That the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law; (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; (5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy[.]" Section 10-9.1-1.

9.1-1(a)(6).

An applicant for postconviction relief "'bears the burden of proving, by a preponderance of the evidence, that such relief is warranted in his or her case.'" *Barros v. State*, 180 A.3d 823, 828 (R.I. 2018) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)). As required by the statute, "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Section 10-9.1-7.

III

Analysis

A. Petitioner's Issue I: Ineffective Assistance of Counsel

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[9] U.S. Const. amd. VI. Because the right to counsel "is needed, in order to protect the fundamental right to a fair trial[,]" *Strickland v. Washington*, 466 U.S. 668, 685 (1984), the Court in *Strickland* recognized that '"the right to counsel is the right to the effective assistance of counsel."' *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Since a denial of the right to counsel is a "structural error" without which a fair trial cannot exist, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), if

[9] This language has been interpreted to secure to all felony criminal defendants the right to an attorney regardless of their ability to pay. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *see also Scott v. Illinois*, 440 U.S. 367, 369-73 (1979) (holding that the right only attaches in cases in which actual imprisonment is imposed) (*reaffirming Argersinger v. Hamlin*, 407 U.S. 25 (1972)). The requirement is applicable against the states and applies with full force in state criminal proceedings. *See Argersinger*, 407 U.S. at 30.

a criminal defendant is denied the effective assistance of counsel, the conviction is not valid and must be vacated. *See Strickland*, 466 U.S. at 687.

However, because trial lawyers make myriad strategic decisions which can affect a trial, and because it can be hard to know in retrospect how a trial would have gone differently under counterfactual and often deeply speculative circumstances, courts subject attorney performance to "highly deferential" review. *Id.* at 689. Since the latitude extended to attorney performance is high, *see id.* at 688-91, and the quantum of skill required to provide adequate performance is fairly low, *see id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"), defendants must satisfy an exacting inquiry to show that they were deprived of the effective assistance of counsel.

To prove that an attorney's performance was constitutionally infirm, a disaffected litigant must show first "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Prejudice is proven by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Petitioner's claims do not satisfy either prong of the *Strickland* inquiry.

1

The Y-STR evidence

i

Trial counsel effectively challenged the Y-STR DNA evidence

The first question is whether, considering the unique facts of this case, defense counsel's "acts or omissions were outside the wide range of professionally competent assistance[,]" *Strickland*, 466 U.S. at 690, to such an extreme degree that his "conduct so undermined the proper functioning of the adversarial process [and] the trial cannot be relied on as having produced a just result." *See id.* at 686; *see also id.* at 687-88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness."); *id.* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."); *id.* at 688 ("the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

Trial counsel's failure to consult with a DNA expert was not objectively unreasonable. As the Court explained in ruling on the motion for new trial, Mr. Marizan's counsel did a "very effective job." *See* MNT Tr. at 49:16. Defense counsel vigorously cross-examined Ms. Lupino, *see* Tr. at 521-552, and raised numerous objections to her testimony. *See id.* at 497-99, 503, 509.

It is true that trial counsel's performance wasn't perfect; he objected to one question, the answer to which may have benefitted his client. *Id.* at 519:1-6. He also elicited arguably inaccurate testimony which indicated that the Y-STR test would "be able to

identify whose seminal fluid it was, yes." *Id.* at 541:21-22. Counsel allegedly failed to adduce evidence that would have allowed the jury to understand that the probability the DNA match came from another man was one in roughly 6,667. The lack of such testimony prevented counsel from being able to challenge the "science caught him" allegations from the prosecutor, *see id.* at 616:15, which may have led the jury to believe that the Y-STR match conclusively proved that Mr. Marizan was the source. Even despite these imperfections, counsel's vigorous cross-examination of the Y-STR evidence was reasonable and effective in the context of this case, where the source of the sample was not believably contestable and where trial counsel accordingly pursued a consent theory.

That Attorney Levy could have, but did not, retain an expert to challenge the Y-STR evidence does not alter this conclusion. The United States Supreme Court has squarely addressed whether a State Court unreasonably applied *Strickland* when it held that a trial lawyer who declined to pursue certain expert evidence acted within the constitutionally permissible scope of attorney conduct. *See Harrington v. Richter*, 562 U.S. 86, 97 (2011). The Court held that the application was not unreasonable, explaining that:

> "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, 'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' [] Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach. . . . Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts . . . .
>
> From the perspective of Richter's defense counsel when he was preparing Richter's defense, there were any number of hypothetical experts—specialists in psychiatry,

> psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful. An attorney can avoid activities that appear 'distractive from more important duties.' [] Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." [] *Id.* at 106-07 (citations omitted throughout).

The evidence in the case was that Mr. Lopez and Ms. Pinales performed a prank on Mr. Marizan, which prompted him to get up to wash his face, return to the bedroom with Ms. Escobar, and lock the door. *See* Tr. at 330-334. Ms. Pinales testified that fifteen minutes later the other partygoers opened the door to find the victim and defendant were alone in the bedroom, and the victim was still out cold, as before, but was not wearing pants or underwear. *See id.* at 334-338. Ms. Escobar woke up the next morning largely unclothed and felt what she believed to be semen on her leg. *Id.* at 193-95. Given these facts, Attorney Levy acted reasonably in concluding that the jury would believe the seminal fluid on the vaginal swab came from Petitioner, and to focus his efforts on attempting to justify its presence. Such a course of action was eminently reasonable under the circumstances.

ii

Even if Attorney Levy's performance was not effective, there would be no prejudice

Even if Attorney Levy's challenge to the Y-STR evidence constituted inadequate representation, effectively challenging the Y-STR DNA evidence in the case would not have made a difference in the trial's outcome. This is so because the jury would have had no reason to believe that anyone else had supplied the DNA profile that was found on the vaginal swab. After all, the evidence showed that Petitioner and the victim were both clothed before Petitioner went into the bedroom. *See infra*. He was alone in the room with

her and was thereafter discovered in a state of partial undress nearby to her unclothed, unconscious body.[10] *See id.* Accordingly, Petitioner fails to demonstrate that counsel's allegedly deficient performance "was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial[,]" a standard that "requires a showing that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different." *Barros*, 180 A.3d at 829 (internal quotation omitted).

Petitioner fails to identify anything that would have been different if trial counsel had taken the steps that Petitioner suggests in his Application. Defense counsel may well have convinced the jury that the seminal fluid sample could have come from 1 in 6,667 males in society. But there was no evidence whatsoever in the case that anyone else had the opportunity to be the source of the stain on Ms. Escobar's leg that she testified she believed was semen, even though she washed it off so it could not be tested. The seminal fluid sample on the vaginal swab conceivably could have come from Ms. Escobar's boyfriend days earlier, but there is not a substantial probability that any juror would have believed such to be the case if trial counsel argued the case that way, and doing so would have required him to pursue an entirely different strategy. Such an approach would leave no explanation for why Ms. Escobar woke up naked, or why Mr. Marizan was in a state of partial undress after the door was unlocked. Simply put, there is not a reasonable probability that the jurors would have believed that the seminal fluid sample on the vaginal

[10] In his pre-hearing Memorandum, Petitioner argues that Dr. Ladd would testify that the sample could have come from Escobar's boyfriend and could have been deposited up to five days before the night of the crime. *See* Mem. at 12. However, Dr. Ladd did not thusly testify at the March 1 hearing. *See generally* Mar. Tr.

swab came from anyone other than Marizan. *See Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) ("A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result.") (citations omitted).

2

The consent defense

i

Trial counsel reasonably pursued a consent theory

Given this evidence, it was reasonable for defense counsel to pursue a consent theory, as opposed to taking the strategy of arguing that Petitioner was not the source of the seminal fluid on the vaginal swab. Moreover, defense counsel capably litigated that theory under the circumstances.

Convincing the jury that there was reasonable doubt as to whether Ms. Escobar consented would have negated the charge. It was the best theory available given the evidence, and it certainly was not unreasonable for Mr. Marizan's lawyer to take such a tactical approach. *See Richter*, 562 U.S. at 106. ("There are [] 'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'") (citation omitted). Moreover, a defendant has the "right to make the fundamental choices about his own defense," including whether to testify. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). Mr. Marizan does not argue that his lawyer failed to consult with him before pursuing the consent defense, nor that the lawyer forced him to take that approach. Ostensibly, if Mr. Marizan did not have sex with the victim, he would not have allowed his lawyer to argue that it was a consensual encounter. In fact, Petitioner claimed that he had consensual sex with Ms. Escobar in an

interview he gave with the police. (Mar. Tr. at 23.)

Petitioner argues that, even if pursuing a consent defense was the right approach, it was strategically unwise to do so without putting Mr. Marizan's own statement into evidence, which Attorney Levy himself understood to support the consent theory. *Id.* As the State points out, the statement could not have come in without defendant taking the stand. *See State v. Harnois*, 638 A.2d 532, 536 (R.I. 1994) (cited in State's Post-Hr'g Mem. at 10). It is a defendant's right to decide for himself whether to testify. *See McCoy*, 138 S. Ct. at 1508.[11] Petitioner did not submit an affidavit suggesting that it was not his choice not to testify.

Moreover, advising Petitioner not to testify was a wise course. Petitioner would have been cross-examined about why he denied having intercourse with the victim on the morning after, about his assertion that she had urinated in a cup or urinated on herself, and about whether Ms. Escobar remained asleep during the prank (which Petitioner apparently spoke to during the interview, although the video shows that Ms. Escobar remained asleep). *See* State's Post-Hr'g Mem. at 11. Moreover, Petitioner could have been cross-examined about having his child's mother call Ms. Escobar to try to get Ms. Escobar to drop the charges, about why he evaded arrest, and about his criminal record. *Id.* at 11. The appearance that he was fleeing justice and was trying to lean on witnesses to make the charges disappear would have made him appear guilty.

[11] "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) []. Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983)." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (internal quotations omitted).

ii

Even if Attorney Levy's decision to advise his client not to testify was ineffective, Petitioner would not have suffered prejudice

Even if Attorney Levy worked a constitutional injury when he advised his client not to testify (which could not be the case, given that the decision was always up to Petitioner himself), doing so did not prejudice Petitioner's case. There is not a reasonable probability that the outcome would have been different if trial counsel had introduced Petitioner's statement into evidence. The statement did bolster Petitioner's version of the facts but was self-serving and would have exposed him to potentially debilitating cross-examination. Trial lawyers routinely advise criminal defendants not to testify, and reasonably so. Petitioner's story would not give a reasonable juror any explanation for the video footage of the victim passed out cold, nor for Ms. Escobar's testimony that Petitioner denied that anything happened when she confronted him upon waking up.

IV

Conclusion

For the reasons stated above, this Court concludes that Petitioner has failed to meet his burden of establishing by a preponderance of the evidence that postconviction relief is warranted. Accordingly, Petitioner's Application for Post-Conviction Relief is DENIED and Judgment shall enter for the State of Rhode Island.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Andre Marizan v. State of Rhode Island**
CASE NO:	**PM-2019-8573**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 8, 2023**
JUSTICE/MAGISTRATE:	**Nugent, J.**
ATTORNEYS:	
For Plaintiff:	**Brett V. Beaubien, Esq.; John M. Cicilline, Esq.**
For Defendant:	**Judy Davis, Esq.**